Filed 9/11/12 In re Tristan F. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re TRISTAN F., a Person Coming Under the Juvenile Court Law.	
SAN FRANCISCO HUMAN SERVICES AGENCY et al., Plaintiff and Respondent, v. GLORIA F., Defendant and Appellant.	A133509 (San Francisco City and County Super. Ct. No. JD09-3267)

The juvenile court terminated the parental rights of Gloria F. (mother) and John M. (father) with respect to their son, Tristan. (Welf. & Inst. Code, § 366.26.)[1] Mother appeals, arguing that: (1) the order terminating parental rights must be reversed because the beneficial relationship exception (§ 366.26, subd. (c)(1)(B)(i)) is applicable; (2) the juvenile court abused its discretion in denying her request for a bonding study; (3) the juvenile court failed to consider Tristan's wishes; and (4) the juvenile court's written findings and orders contained a mistaken finding that visitation with Mother is detrimental. We affirm.

[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from our August 4, 2011 opinion, in which we denied, on the merits, mother's writ petition (No. A132058) challenging the termination of reunification services and setting of a section 366.26 hearing.[2]

"*Section 300 Petition*

"On September 29, 2009, the [San Francisco Human Services Agency (Agency)] filed a section 300 petition on behalf of Tristan, who was seven years old at the time. The petition alleged mother's failure to protect Tristan (§ 300, subd. (b)), on the grounds that mother was unable to provide adequate care because of untreated mental illness, substance abuse, and anger management problems. The petition was initiated after the police were called on September 25, 2009, when mother was walking down the street with Tristan while 'severely intoxicated' and 'totally out of control.' Mother was physically and verbally combative with police officers who arrived at the scene. She later admitted resisting arrest. The petition states that mother has a criminal history dating back to 2003, that Tristan had previously been declared a court dependent, and that there have been nine previous dependency referrals involving alcohol abuse, domestic violence, and physical abuse and neglect. According to the petition, mother has also 'educationally neglected' Tristan. Finally, the petition states that Tristan's alleged father has been unable to protect him from mother's abuse and has a history of domestic violence with mother.[3]

"*Detention Report & Hearing*

"The detention report was written by social worker Karla Veal. Veal reported that, on September 25, 2009, a concerned citizen reported mother was severely intoxicated and walking in and out of traffic with a young child. When police arrived,

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[2] Mother filed a request for judicial notice of our record in this prior writ proceeding. We originally deferred ruling, but now grant the unopposed request. (Evid. Code, § 452, subd. (d)(1).)

[3] Father apparently has been deported to Ireland. He is not involved in the instant proceedings, and therefore is not further referenced in our opinion.

mother was combative and used profanity in front of Tristan, despite being warned that her behavior was upsetting to him. Tristan informed the officers that '[mother] swears a lot and that [she] drinks sometimes but not as much as she used to.' A police report was attached to the detention report. Mother admitted two prior arrests, occurring in 2003 and 2005. The report indicated that Tristan had been previously detained in January, 2009, due to allegations of physical abuse and neglect by mother. He had been returned to mother, who engaged in some voluntary services. The report also indicates: 'The Indian Child Welfare Act does or may apply. [¶] . . . [¶] The mother reports that she is full blood Shu Swap [*sic*] from Canada but that her tribe is not federally recognized.'

"An addendum detention report indicated that the social worker had spoken with the arresting officer, who confirmed that mother was arrested for public intoxication and resisting arrest. The officer stated that mother's record revealed she had previously been arrested for driving under the influence. The social worker also interviewed Tristan, who stated he was aware that mother was drunk on September 25 because he had seen her drunk before. Tristan also stated that he 'takes care of himself' by cooking and arranging a ride to school when his mother is drunk.

"On September 30, 2009, [Commissioner Catherine Lyons] ordered Tristan detained in foster care.

"*Jurisdiction Report and Determination*

"In the jurisdiction/disposition report, filed November 16, 2009, a new social worker, Vicki Saltzer-Lamb, wrote: 'When she was 10, [mother] was gang-raped by her three teenaged brothers and went to live with her maternal uncle. She left his home when she was 16 and has been on her own since that time. . . . [¶] . . . [¶] In 9/07, the mother filed a report alleging that the father was sexually molesting Tristan. . . . [¶] On 1/09, [mother] was arrested and charged with [c]hild [c]ruelty after she allegedly physically assaulted Tristan and left him alone at home while she was intoxicated.'

"The report indicated that mother began inconsistently attending therapy in March 2009. Mother was diagnosed with an adjustment disorder and had been prescribed Effexor, which she had not been taking. Saltzer-Lamb wrote: '[M]other adamantly

denies that she has a problem with alcohol, states she has stopped drinking and is not interested in participating in treatment.' The report noted that mother and Tristan were visiting weekly and would soon begin therapeutic visitation. The social worker indicated that mother had been referred for a substance abuse evaluation and random testing. The report concluded: 'There is a need for Court intervention and placement, and return of the child would be detrimental to the safety, protection, or emotional or physical well being of the child because: The mother has an alcohol abuse problem and mental health issues for which she is not being currently . . . treat[ed].'

"On January 29, 2010, mother submitted on the allegations of the petition at the jurisdiction and disposition hearing. [Commissioner Lyons] adjudged Tristan to be a dependant of the juvenile court and ordered supervised visitation and reunification services for mother. The court adopted the Agency's proposed reunification plan, which provided: '[T]o be considered for reunification, the mother must complete the following service plan: [¶] 1. That the mother complete an outpatient drug/alcohol treatment program which includes counseling and testing, and that she not terminate the program without the approval of the Child Welfare Worker. (This program must have a strong alcohol abuse focus.) [¶] That the mother undergo a psychological evaluation and follow any recommended treatment. . . . [¶] 2. Individual therapy. [¶] 3. That the mother remain under the care of a qualified mental health professional and comply with the mental health professional's recommendations for psychotherapy and/or prescribed medication. [¶] 4. That the mother sign necessary consents to release information, in order to evaluate her compliance with the reunification services. [¶] 5. That the mother visit the child on a regular basis prior to reunification and maintain other contact and involvement, as arranged by the Child Welfare Worker.'

"*Six-Month Review*

"The six-month review report, filed by the Agency on July 7, 2010, recommended that reunification services for mother be continued for an additional six months. The new social worker assigned to the case, Tommy Pazhempallil, indicated, in his report, that mother had completed a psychological evaluation and was under the care of a therapist.

The therapist reported that mother had missed some sessions. The report also stated: 'The mother is diagnosed with PTSD both in early development and as an adult after becoming a victim of sexual abuse. She has [a] long history of alcohol abuse with prior DUI convictions. She [also has a] diagnosis of Borderline Personality Disorder on Axis II. [¶] . . . [¶] The mother denies any addiction problems.'

"Pazhempallil wrote: 'The mother has not fully utilized therapeutic visitation services to her advantage to gain effective parenting skills. She cancelled several therapeutic visitation sessions scheduled for 1/20/10, 1/27/10, 2/3/10, 2/17/10, 2/18/10, 2/24/10, 2/16/10, 3/1/10 for numerous reasons including being busy with moving, sick or having to work.' Accordingly, visits were reduced to once a week. The report continued: 'Tristan attends therapy every Tuesday. According to his therapist . . . [he] is showing more maturity and is thriving with all the support and care from his foster parents. . . . [¶] . . . [¶] The minor and his mother have been visiting weekly.'

"The report indicated that mother started an outpatient substance abuse treatment program, at the IRIS Center, and then quit in January 2010. The report observed: '[M]other was again referred for out-patient program, but did not further provide the Agency any proof of enrollment in any program. The mother stopped random testing after her last testing on 1/25/10. The mother did not follow-through with subsequent referrals for drug testing on 3/3/10 and again on 5/5/10. While she was testing prior to 1/25/10, the mother tested positive for marijuana five times.'

"At the review hearing, on August 4, 2010, [Commissioner Lyons] renewed Tristan's dependency status and ordered services to continue.

"*12-Month Review Report*

"The 12-month review hearing was originally calendared for December 1, 2010. The status review report, filed on November 15, 2010, recommended that reunification services be terminated. The report noted that mother had 'made progress in keeping therapeutic visits [with Tristan] regularly and had been demonstrating appropriate parenting skills during visits.' But, the foster mother reported that 'the minor came back from a few of these visits on Thursdays confused and anxious recounting stories and

conversations [with] mother . . . . It has been reported that during one of the visits, the mother made the minor believe that when the police arrested her she was beaten up by the police, who also hurt her and stole her stuff. On another visit, Tristan came back believing that his foster mother and attorney want to keep him in foster care because they are getting paid.'

"The report noted that mother had resumed weekly drug testing after August 17, 2010. However, three out of the 12 tests had been positive for marijuana. The report also observed: 'It is unknown to the Agency, if the mother has worked through her alcoholism . . . . The mother adamantly denies that she has a problem with alcohol and states that she has stopped drinking.' The report states: '[A] case manager at Lee Woodward [Counseling Center] on 11/10/10 verified on the phone that the mother had just started out patient treatment at [that] agency effective 10/13/10, and she has been attending groups. The Agency has not received any detailed information or verification of the mother's requirements for participation or her attendance in out-patient services at Lee Woodward. According to [the case manager], the mother had specifically instructed Lee Woodward not to provide any written verification of mother's participation.'

"With respect to mother's progress on her mental health issues, the report noted: 'Tenderloin [Mental Health] Clinic staff verified that the mother did not keep her 8/31/10 intake appointment for psychiatric services. The mother later informed the Agency that she had rescheduled her intake appointment for 10/18/10, and again for 10/29/10, but [she] did not follow through with the appointment. On 11/8/10, the mother called again [to] report she has been scheduled for an assessment appointment on 11/17/10. The mother has not followed-through with the referral given to her for mental health services in a timely manner.' The report also stated that mother had not provided her consent to release information from the Clinic to the Agency. However, mother had been attending regularly therapy sessions with a marriage and family therapist . . . .

"Pazhempallil wrote that he 'met with the mother in person every month and made phone contacts regularly. During these contacts, the mother was reminded about her responsibilities and court ordered requirements for reunification.' The report contained

the following assessment: 'Despite many services offered to the mother, over a period of several years, including during the last 12 months of reunification, the mother's underlying problems of substance abuse and need for mental health treatment services has not been addressed. The mother has the tendency to choose the services that she wants and refuse services she does [not] consider as important. Her denial about her problems, and resistance to substance abuse treatment services and mental health treatment have prevented her from fully utilizing these services in a timely manner. Her recent positive tests for marijuana, three times in October 2010, raises serious concerns about her efforts to remain clean and sober. [¶] . . . [¶] At this time of twelve months into reunification, the mother has made only minimal progress towards her reunification goals. She has not made any serious effort towards resolving substance abuse issues and mental health treatment needs. . . . The mother continues to avoid participation in required services in a timely manner and she engages in finding reasons or excuses for not participating each time. [¶] [Mother's] explosive anger issues continue to impede her ability to maintain healthy interpersonal relationships. Incidents reported by service providers and situations experienced by the undersigned indicate that the mother can become angry very easily, resulting in serious conflicts and verbal confrontations with others. Given her history and current stressors, it is very difficult for her to be effective with regard to parenting.' The report noted that an adoptive home study was in progress.

"[Commissioner Lyons] continued the 12-month review hearing after appointing new counsel to represent mother.

"*Mother's Motion to Change Visitation*

"On January 3, 2011, mother asked the court to modify its visitation order to allow for unsupervised visitation. [Commissioner Lyons] denied mother's motion.

"*Participation by the Simpcw First Nation*

"On January 26, 2011, the chief of the Simpcw First Nation (the Nation)[4] wrote a letter to the court, which stated: 'Please be advised that [Tristan] is a registered member of the Simpcw First Nation and a Canadian citizen. As such, our Nation has an interest in the planning for any child from this community. [¶] . . . [¶] While our band has no interest in disrupting Tristan's life, we do wish to be advised and involved in any planning affecting him. We believe that it is essential that [he] be aware of his heritage and be permitted to maintain links to his culture, community and extended family.'

"Mother filed a motion to continue the 12-month review hearing so that the Nation's interest could be evaluated. Mother conceded that [the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.)] did not apply because the Nation is not a federally recognized tribe. Nonetheless, Mother argued that ICWA standards should be used in Tristan's case as 'a best practices guide.' [Commissioners Lyons] continued the 12-month review hearing to April 4, 2011, and set a hearing in the interim to determine ICWA applicability.

"The Nation also filed a motion to dismiss the dependency petition so that proceedings could be initiated in a Canadian court. In the alternative, it sought to participate in the dependency proceedings, pursuant to section 306.6.[5]

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[4] The Nation is one of seven Indian Bands within the Secwepemc Nation in British Columbia.

[5] Section 306.6, subdivision (a), provides: "In a dependency proceeding involving a child who would otherwise be an Indian child, based on the definition contained in paragraph (4) of Section 1903 of [ICWA], but is not an Indian child based on status of the child's tribe, as defined in paragraph (8) of Section 1903 of [ICWA], the court may permit the tribe from which the child is descended to participate in the proceeding upon request of the tribe." Section 306.6, subdivision (d), provides in relevant part: "This section is intended to assist the court in making decisions that are in the best interest of the child by permitting a tribe . . . to inform the court and parties to the proceeding about placement options for the child within the child's extended family or the tribal community, services and programs available to the child and the child's parents as Indians, and other unique interests the child or the child's parents may have as Indians.

"On March 24, 2011, [Commissioner Lyons] denied the Nation's motion to dismiss, but granted its motion to participate. The court also concluded that ICWA does not apply because the Nation is not recognized by the United States federal government. (See *In re Wanomi P.* (1989) 216 Cal.App.3d 156, 159, 166–168, 171 [juvenile court erred in concluding ICWA applied to child born to mother who is member of Canadian Indian tribe].)

"*Termination of Nontherapeutic Supervised Visitation*

"Tristan's counsel notified the court that '[he] continues to receive information that the mother is behaving inappropriately during her supervised visits.' Specifically, counsel noted that the visitation supervisor informed him that 'during the visit on January 29, 2011 [mother] promised Tristan 20,000 dollars from a lawsuit against MUNI. The lawsuit is far from being resolved. Tristan was very excited and spent much of the weekend obsessing about the money. In spite of previous admonitions, mother continues to have discussions with Tristan during the Saturday visits that are disruptive and harmful to her son.' Thereafter, the court suspended supervised visitation. Therapeutic supervised visitation remained ongoing.

"*Addendum Status Review Report*

"On March 16, 2011, the Agency filed an addendum status review report, in which the Agency continued to recommend termination of reunification services. The Agency noted that mother had continued to refuse to authorize the release of information to the Nation or from Lee Woodward. The Agency had also not received any verification from the Tenderloin Clinic showing that mother had participated in mental health treatment services. The Agency concluded: '[M]other has not completed an out-patient drug/alcohol treatment program during the reunification period. Given her extensive history of alcoholism and arrests for public drunkenness and DUI, her recent engagement

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This section shall not be construed to make [ICWA], or any state law implementing [ICWA], applicable to the proceedings . . . ."

in treatment services at Lee Woodward during the last four months has been minimal to address her long history of alcoholism.'

"The addendum report also noted that Tristan had suffered anxiety and confusion after recent visits with mother. For example, he was told that he would soon be going to live with his maternal uncle in British Columbia. The report concluded: '[Mother's] inconsistent and inadequate progress towards reunification, presents a high risk level for further abuse or neglect if the minor is returned to the mother. [Mother's] mental health and substance abuse problems also remain unaddressed leading to her inability to cope with situational stressors, crises or problems that will arise while parenting a minor.'

"*Contested 12-Month/18-Month Review Hearing*

"The contested 12-month and 18-month review hearing was held[, before Commissioner Lyons,] over the course of several days in April and May 2011.

"Tristan's counsel called the psychologist who conducted an evaluation of mother, in December 2009. The evaluation report was admitted into evidence. Dr. Holden testified that, given mother's apparent lack of compliance with therapy at that time, 'it would be supremely difficult for her to overcome [her emotional impairments] to a significant degree.' Dr. Holden also testified that mother would need long-term external support and structure to experience less stress.

"The social worker, Pazhempallil, testified regarding the reunification services offered and mother's progress under the plan. He stated that mother had failed to submit to drug testing between January 25, 2010 and August 17, 2010. When mother stopped drug testing, Pazhempallil met with her and reminded her of the requirement. Mother told him that she was too busy seeking employment and could not find the time for testing. She resumed testing consistently on August 25, 2010. Since that time she had never tested positive for alcohol.

"Pazhempallil testified that mother had discontinued outpatient treatment at the IRIS Center, after complaining that the program was incompatible with her work schedule. He met with her to remind her of the reunification requirements and provided her with a list of 17 alternative outpatient centers in May 2010. Ultimately, he was

informed that mother began outpatient treatment at Lee Woodward in approximately October 2010. He also testified that one of the requirements of mother's reunification plan was that she provide her consent for the release of information from Lee Woodward to the Agency. However, Pazhempallil had never received a valid release. He did receive a copy of a release from mother's attorney in March 2011, but stated it had expired by the time he received it. He had spoken with a case manager at Lee Woodward but was told that mother had given specific instructions not to share 'any documentation or verification.'

"Pazhempallil also testified that mother's nontherapeutic supervised visits with Tristan at the Bayview Family Resource Center had been terminated because of concerns regarding the interactions. It was reported by the foster parents that Tristan displayed anxiety and confusion after those visits. Supervised therapeutic visitation remained ongoing and productive. Unsupervised visitation was considered at one point, but was not approved because of mother's behavior during supervised visits and her lack of progress towards reunification. [¶] . . . [¶] . . . Pazhempallil concluded that reunification services should be terminated because 'mother has not utilized [such services], within a reasonable period of time, to work towards reunification goals . . . .' [¶] . . . [¶]

"The director of operations for the Dry Dock, Alexandra Blacis, testified for mother. Dry Dock hosts 12-step meetings. Blacis testified that mother began attending Alcoholics Anonymous (AA) meetings in March 2010. She testified: 'I saw her almost every day . . . .' She further testified: '[Mother has] grown in leaps and bounds. She doesn't explode anymore. . . . [S]he's got a calmness about her. When we discussed the case and her feelings about it she's analytical and calm whereas early on she was a little bit volatile. So there's been a tremendous amount of growth . . . .' Mother had become a sponsor and served as secretary at several AA meetings a week. Mother told Blacis that she had relapsed on one occasion.

"Mother testified and acknowledged she had an alcohol problem. She testified that she quit treatment at the IRIS Center for several reasons. First, she did not feel comfortable and safe there. She also lost her disability income and the IRIS schedule

interfered with her ability to work. Mother was told that she would not get her son back if she was homeless. Mother told the social worker she wanted to go to Friendship House for treatment of her alcohol problem.[6] Because the Friendship House in San Francisco only offered residential services, mother continued to ask for a referral to a different program. Mother was referred to Lee Woodward in August 2010. She was put on a wait list and began treatment in October 2010. Mother testified that the program was 'awesome' and she would be graduating in April 2011.

"Mother began attending AA meetings in February 2010. She had one relapse, in July 2010, when she had one beer. Mother said she had not had a drink since. Mother testified that she did not smoke marijuana. She only tested positive for marijuana because she had been in the same room with a former boyfriend who smoked it. [¶] Mother had also been attending weekly therapy. [¶] . . . [¶]

"[*Termination of Reunification Services*]

"After argument, [Commissioner Lyons] indicated on the record: 'I will follow the recommendation of the Agency in this case. I don't do it happily, but I believe the evidence requires this result.' The juvenile court found that return of Tristan to mother would create a substantial risk of detriment. The court said: 'The facts upon which [I base] the decision that his return would be detrimental are generally a failure of the mother . . . to consistently participate in her treatment programs; more particularly her refusal to release information to the Agency, to the tribe and the band, her refusal to meet with the social worker, misrepresenting facts to Tristan during visits, her use of marijuana.' The court concluded that there was no substantial possibility of return. The court also found that the Agency had provided reasonable services to mother. Reunification services were terminated and a section 366.26 hearing was scheduled for August 31, 2011. . . ."

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[6] Mother had experience with the Friendship House in Canada, where she had received help for her alcohol abuse. She relapsed after she left.

The following facts concern events that occurred after the juvenile court terminated reunification services:

Placement and De Facto Parent Hearings

While mother's writ petition was pending before this court, she filed an application for ex parte hearing regarding placement. Mother asked the juvenile court to delay placing Tristan in an adoptive home until relative placement assessments had been completed. On June 1, 2011, Commissioner Lyons granted mother's ex parte application.

Thereafter, Tristan's respite caregivers, Deirdre E. and Kent H., asked to be appointed de facto parents. A supplement to the de facto parent request, filed by Tristan's counsel, indicated that Tristan wanted to live with Deirdre and Kent and that he had begun calling them "Mommy" and "Daddy." Tristan's counsel indicated that he supported the de facto parent request. On July 14, 2011, Commissioner Lyons granted Deirdre's and Kent's request for de facto parent status and appointed counsel to represent them.

Tristan's counsel filed an ex parte application to reduce supervised visits with mother from weekly to once a month. The motion stated that visits continued to be disruptive and that Tristan was acting out after visits. Commissioner Lyons granted the application.

The Agency also submitted a request to change a court order (Judicial Council Forms, form JV-180), which recommended that Tristan be placed with the de facto parents immediately. The Agency's JV-180 report indicated that it had not been made aware of the potential for placement with mother's relatives in Canada until February 2011—17 months after Tristan was detained. Furthermore, mother had refused to sign consent forms allowing the Agency to speak directly with maternal relatives. The report also noted: "[T]he Agency became aware of the interest expressed by [Deirdre] and Kent . . . in adopting Tristan in the event that the reunification with [mother] did not materialize. Tristan has already developed a very special relationship with [Deirdre] and Kent, who have been involved in hi[s] life, ever since he moved into foster care effective September 2009. As approved by the Agency, Tristan has been visiting the couple

overnights on Saturday effective November 2010, and also on Wednesdays effective March 2011. . . . Both [Deirdre] and Kent have already become a big part of his life in a very positive way. It has been reported that Tristan looks forward to these visits and enjoys the time he spends with [Deirdre] and Kent.

"The Agency received a homestudy for [Deirdre] and Kent, which has been reviewed and approved by the Agency. Since the efforts made [by] the Agency to identify a potential relative home for Tristan did not yield any results, a disclosure meeting was held with [Deirdre] and Kent on 5/26/11 considering the best interest of the minor. After the couple expressed their willingness to pursue Tristan's adoption, the Agency made the decision for a change of placement for Tristan effective 6/2/11. Both [Deirdre] and Kent have dual Canadian Citizenship and [Deirdre] reportedly has lineage to Cree First Nations in Canada through maternal relatives who currently reside[] in Nanaimo, on Vancouver Island in British Columbia, Canada. They hold deep respect for this and have conveyed their full intention to do everything in their power to facilitate and maintain a connection between Tristan's cultural and family heritage. They have also expressed their willingness to plan summer family vacations to introduce Tristan to his heritage and culture through participation in Powwows or other cultural ceremonies in British Columbia. They fully support the fact that it is very important for Tristan to be connected to and proud of his ancestral history. [¶] . . . [¶]

"Tristan has not developed any relationship with his extended family in Canada as it was never promoted or encouraged by . . . mother. He had no contacts or visits with any of the relatives after he left Canada with his mother at a very young age. He does not remember any of his maternal relatives and does not know any relatives except through what the mother has told him recently about individual names and relationships. [¶] . . . [¶] [Deirdre] and Kent have informed the Agency that they are very open to maintaining contacts and connections with [mother] and maternal relatives in Canada. The Agency intends to refer the matter to the Consortium for Children for permanency planning mediation to establish written plan for contact between the family members, the Band and [Tristan.]"

Mother opposed the request for a change of placement, arguing that relative placement was preferred. On July 20, 2011, the Agency submitted an additional report. Pazhempallil indicated that further assessment of the maternal relatives had been conducted. Pazhempallil wrote: "The Agency's administrative staff appreciated the fact that the court proceedings and the Band's involvement in this matter have facilitated in the finding of relatives and extended family members. However, because of the fact that Tristan has not developed significant relationships with any of the maternal relatives after he left Canada with his mother when he was two and a half-years old, they remain as strangers to him. . . . During consultations it was noted that Tristan had the opportunity to have a relationship with [Deirdre] and Kent which, gradually, blossomed to a special and intimate one. Severing this all important relationship and his special ties he developed in San Francisco by relocating Tristan to Canada, will only undermine the progress made and further elevate the risk of trauma and insecurity . . . . [¶] On 7/11/11, the undersigned . . . consulted with Dr. Liberman, Psychologist Consultant and Child Trauma Expert. According to Dr. Liberman, Tristan is at an age, where he has developed an insecure attachment with his mother and he feels very responsible to protect her and be loyal to her. Having experienced many psychological difficulties and trauma in his life, while being raised by his mother who has been diagnosed with Post Traumatic Stress Disorder, Mood Instability, and Borderline Personality Disorder, Tristan feels obligated to please his mother. Although Tristan has developed a very strong sense of divided loyalty, he has been thriving in a developmentally supportive foster family environment for the last two years. Placing the minor in Canada will make him more vulnerable to further insecurity and instability since the mother has promised to come to Canada and bring him back to San Francisco. [¶] . . . Dr. Liberman strongly believes that placing [Tristan] in Canada will be detrimental to Tristan's best interest as there is every risk for him retreating to unstable and unpredictable emotional and behavioral problems."

Pazhempallil's report went on to note: "[I] had the opportunity to witness the very personal interactions between Tristan and Kent on two occasions. During a face-to-face meeting with the minor in the home [Deirdre] and Kent on 7-5-11, Tristan was seen

engaging and interacting with Kent with [as] much emotional attachment as any 9 year-old child would relate to his father. When [I] was having conversations with Kent, Tristan came near where Kent was sitting; leaned on him with much fondness, put his arms around Kent, and joined in conversations about the fun things they did during a recent South Lake Tahoe trip. They were seen to be very playful and friendly, with Kent very patient with him . . . ." Pazhempallil continued to recommend that Tristan be placed with the de facto parents. Tristan's counsel supported the Agency's recommendation, noting that "[Tristan] has consistently stated that he wants to live with the de facto parents."

At the hearing, on July 28, 2011, Tristan's court-appointed special advocate (CASA) observed: "Tristan appears very comfortable and happy and stable with Kent and [Deirdre]. I have had multiple conversations with both of them about Tristan and their relationship. That is not to say that he doesn't express conflicted emotions regarding his mother, he certainly does, and so I can't go into too much with regard to his particular opinion about where he wants to wind up permanently. But I will say that he appears comfortable there with [Deirdre] and Kent and has for the last few months . . . ." Commissioner Lyons granted the Agency's request to place Tristan with the de facto parents.

Writ Proceedings

As noted *ante*, on August 4, 2011, we denied, on the merits, mother's writ petition (No. A132058) challenging the setting of a section 366.26 hearing.[7]

Section 366.26 Report

In advance of the section 366.26 hearing, the Agency submitted a section 366.26 report recommending that parental rights be terminated and adoption approved as the

[7] On the same day, mother filed a request to change court order, seeking reinstatement of family reunification services, on the ground that mother had initiated an anger management program and focused on anger issues during individual therapy. The record does not indicate any ruling on the request. But, mother has not raised any issue on appeal regarding the request.

permanent plan. Pazhempallil wrote that Tristan had no special educational, developmental, or health concerns. He also concluded that Tristan is "very adoptable" and that "adoption with [Deirdre] and Kent is in the best interest and well-being of [Tristan]." Pazhempallil wrote: "[Deirdre] has advanced training in counseling psychology. She is knowledgeable about the developmental and emotional needs of all children. She has extensive experience working with children of all ages both as a school teacher and as a licensed therapist. She has an excellent understanding of children's basic needs and special needs of children who have experienced trauma and hardship in their lives. . . . [¶] . . . [¶] [Deirdre] and Kent have become very attached to Tristan. They have given extensive consideration to how becoming parents will completely and irreversibly affect their lives. They have actively prepared to become parents, in general, and parents of Tristan, specifically. . . . They are deeply committed to adopting Tristan and being caring, loving parents to him for the rest of their lives. [¶] . . . [¶] Tristan is fully aware of the permanent plan of adoption with [Deirdre] and Kent. He has reported that he likes being in the [their] home . . . and on occasions asked [Deirdre] if she would adopt him. When over-night visits started Tristan looked forward to those visits with much enthusiasm and excitement."

With respect to Tristan's relationship with mother, it was noted: "Tristan was raised mostly by his mother with whom he has maintained [a] relationship through visits after reunification services have been terminated. During the time of reunification, [Tristan] and [mother] were offered therapeutic visitation. When transitioning therapeutic visits to supervised visits, in May 2011, Tristan asked for more visits with [mother]. The undersigned believes that Tristan was asking for more visits in reaction to the mother's urging to do so. After visits have been reduced starting July, 2011 Tristan has not expressed any concern about reducing the visits to once a month. [¶] . . . [¶] Considering Tristan's age and relationship with his mother, it is recommended that a plan for supervised contact/visits between [Tristan] and [mother] be developed through permanency planning mediation. The Agency is recommending supervised visits for [mother], as agreed upon by all parties, in the form of a postadoption contact agreement

facilitated by Consortium for Children. The Agency is also recommending that supervised visits ordered by the court be terminated for the mother."[8]

Bonding Study

Three weeks before the scheduled section 366.26 hearing, mother filed a motion, pursuant to Evidence Code section 730,[9] for appointment of an expert witness to conduct a bonding study and determine whether it would be detrimental to Tristan to terminate parental rights. The Agency, minor's counsel, and the de facto parents opposed mother's motion, on the grounds that it was untimely and unnecessary. On August 31, 2011, Judge Patrick Mahoney continued the section 366.26 hearing to October and denied the motion for a bonding study, stating: "[I]t does seem to me that the [*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195 (*Richard C.*)] case is compelling in terms of addressing this issue."

CASA's Report

Tristan's CASA submitted a report to the juvenile court recommending that the de facto parents be appointed Tristan's legal guardians. The CASA reported that Tristan

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[8] "Although the Legislature has declared that 'some adoptive children may benefit from either direct or indirect contact with birth relatives, including the birth parent or parents . . . , after being adopted' and has recognized postadoption contact agreements (Fam. Code, § 8616.5, subd. (a)), such agreements are entirely voluntary (see Fam. Code, § 8616.5, subds. (a), (b); see also . . . § 366.26, subd. (a) ['Section 8616.5 of the Family Code is applicable and available to all dependent children meeting the requirements of that section, if the postadoption contact agreement has been entered into voluntarily']). Even where there is an agreement for postadoption contact with a biological parent, the subsequent refusal of an adoptive parent to comply with the agreement does not affect the adoption. (See Fam. Code, § 8616.5, subd. (e)(1) [a postadoption contact agreement must contain a warning that 'the adoption cannot be set aside due to the failure of an adopting parent . . . to follow the terms . . .' of the agreement].)" (*In re C.B.* (2010) 190 Cal.App.4th 102, 128, fn. 7 (*C.B.*))

[9] Evidence Code section 730 provides, in relevant part: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

appeared "happy and engaged" with Deirdre and Kent. He also noted that Tristan continued to visit with mother, who the CASA had not spoken to, excepting intermittent meetings at court. "When asked about these visits [with mother], Tristan's behavior and responses modulate between reserved and extremely closed."

Permanent Plan Hearing

The hearing on selection of a permanent plan took place, on October 17, 2011, before Judge Charlotte Woolard. At the beginning of the contested hearing, mother's counsel requested a ruling on whether the supervising visitation therapist could testify. Tristan's counsel invoked the therapist-patient privilege and also objected that any testimony the therapist had to present would be stale since she had not seen Tristan and mother in five months. The court ruled as follows: "I'm not going to allow the testimony from the therapist. I do find that the child through the attorney has asserted the therapist-patient privilege, and I do find the testimony would be remote in time."[10]

Pazhempallil testified as a child welfare expert on the Agency's behalf. He stated that Tristan had been living with the de facto parents since July 28, 2011. He further testified that the de facto parents "very much want to adopt Tristan" and that Tristan was adoptable. He testified: "[T]he [de facto parents] are more than willing to have [Tristan] remain connected with his ancestry and his maternal electives [*sic*]. [¶] . . . [¶] The fact about relationship between the mother and Tristan, the agency has made a referral to the Consortium for Children for permanency planning mediation, and the agency believes that those contacts should remain within the framework of mediated contacts." He reported that mother was visiting with Tristan once a month and "it has been observed that the visits have been going well." However, Tristan found it difficult to transition after visits and had a history of defiance and acting out after visits. Tristan had not requested more visits with mother since they had been reduced.

Pazhempallil stated his belief that adoption by the de facto parents is in Tristan's best interest and that Tristan's attachment to them is similar to a parental bond. Tristan

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[10] Mother does not challenge this ruling on appeal.

had progressed behaviorally and academically in the de facto parent's home. Tristan knew that the Agency was recommending adoption, understood its permanency, and told the de facto parents that he would like to be adopted.

On cross-examination by Tristan's counsel, Pazhempallil testified that, at the last visit between mother and Tristan, minor's counsel commented that he had seen mother whispering into Tristan's ear. Pazhempallil recommended that mother's visits be terminated. When asked by de facto parents' counsel about Tristan's relationship with mother, Pazhempallil stated: "Tristan has bonded very well [with the de facto parents] over the last two year time. His relationship with the mother is being, having [been] raised by her, there has been a lot of inconsistency in providing the care and protection and so he is in a state of confusion." Mother had not provided day-to-day care for Tristan in over two years and Pazhempallil believed that their bond did not rise to the level of a typical parental bond. Mother never had unsupervised visits with Tristan.

On cross-examination by mother's counsel, Pazhempallil conceded that Tristan had lived eight out of his 10 years, or about 80 percent of his life, with mother as his primary caretaker. Tristan knows her as "mommy." Pazhempallil testified that mother was somewhat inconsistent in visitation in the beginning of the dependency case, but once she engaged in therapy she had visited regularly with Tristan. Most recently, she had only missed one visit, in August, because she reported being sick. Some of these visits took place in mother's home, where she made meals for Tristan and played with him. He testified that Tristan understood the permanency of adoption. When asked if Tristan understood he may never see his mother again, Pazhempallil answered: "[T]he conduct and visits all need to be determined as far as mediation, so I have no answer for that." He testified that Tristan's visits with mother "[have] not been benefiting him in the way [they] should be. [¶] . . . [¶] When Tristan is coming back from those visits . . . to a state of more behavioral or emotional problems right after the visits, those visits were not conducive, helping [his] well-being at all." He explained further: "[T]here [have] been several . . . instances where mother would offer money or rewards to Tristan. So that was

again causing a lot of emotional anxiety in Tristan after those visits." Pazhempallil did not believe it would be detrimental if Tristan never saw his mother again.

Mother testified, on her own behalf, that she and Tristan lived in Canada until he was three and a half years old. They returned to San Francisco to live with Tristan's father, but mother eventually obtained full custody. During the time that mother was Tristan's primary caregiver, she took him to school, cooked for him, played with him, and put him to bed at night. After Tristan was removed from her custody, she had regular supervised visits. During those visits, mother provided food for Tristan, spoke with him about his feelings, played with him, and held him. She testified regarding a visit after reunification services were terminated: "[Tristan] was very upset. I was very angry. He was crying for the first hour of our visit. I just held him and he kept saying why. [The Agency] said they were going to have me stay overnight in December, and now they are saying that they want to not even let me see you anymore. And I told him I didn't know, I was doing everything I was supposed to do and I just didn't know why things were happening the way they were. I am doing my best. And that, you know, they are responsible for him and they make the decisions for him. And that he's been taken from me because of my drinking." Mother said she has a bond with Tristan, explaining: "Even though we don't spend as much time as I would like to be able to spend with my son, when we are together, everything just—it's like a puzzle piece. It's just right. And it feels good and when I hold him and talk to him, I just see his relief in his eyes, that he is happy to be with me. And when we are together it's just so amazing. And when the visit comes to an end, his whole demeanor changes. And I just tell him be a strong boy and to listen and that everything is going to be okay."

At the conclusion of the evidence, the Agency, Tristan's counsel, and counsel for the de facto parents recommended that parental rights be terminated. No one opposed referral to the Consortium for Children to determine if postadoption visitation with mother was in Tristan's best interests. In fact, the Agency argued: "Yes, there is clear evidence throughout this case history that Tristan has been in a state of confusion. And it is because of that confusion that visits had to be gradually reduced and now to the point

of being terminated. However, Mr. Pazhempallil did testify that a referral to the Consortium for Child[ren] would be appropriate. . . . [T]he referral should be done because it is important that we look at all the areas of Tristan's life and that we look at everyone that plays a role, and if it is in Tristan's best interests to have visitation with his biological mother once the Court goes forward and makes this order, that can be determined by his adoptive parents, by the professionals that are in the consortium, and along with [mother.]" Mother's counsel argued that the beneficial relationship exception to termination had been proved.

The juvenile court concluded: "I don't think the [beneficial relationship] exception has been demonstrated, and I'm going to follow the recommendation of the [Agency]. [¶] The Court has read and considered the assessment prepared under . . . section 366.26, and has considered the report and the recommendation of the social worker. The Court has considered the wishes of the child consistent with the child's age. . . . [¶] . . . [¶] At this time supervised visits with mother . . . are terminated." The juvenile court, in its written findings and orders, found that notice had been given as required by law, found it likely that Tristan will be adopted, terminated mother's and father's parental rights, and selected adoption as Tristan's permanent plan.[11] The court also checked a box indicating that "[v]isitation between [Tristan] and [mother] is detrimental to the child's physical or emotional well-being and is terminated." Mother filed a timely notice of appeal, indicating that she appealed from the order terminating parental rights.

II. DISCUSSION

On appeal, mother does not challenge the juvenile court's finding that it is likely Tristan will be adopted, within the meaning of section 366.26, subdivision (c)(1). Instead, she argues: (1) the order terminating parental rights must be reversed because the beneficial relationship exception is applicable; (2) the juvenile court abused its discretion in denying her request for a bonding study; (3) the juvenile court failed to consider Tristan's wishes; and (4) the juvenile court's written findings and orders

[11] The written order was signed by Judge Mahoney, on behalf of Judge Woolard.

contained a mistaken finding that visitation with Mother is detrimental. Only the final argument has merit.

A. *Beneficial Relationship Exception*

First, mother asserts the juvenile court erred when it determined the beneficial relationship exception, under section 366.26, subdivision (c)(1)(B)(i), did not apply to preclude termination of parental rights.

"Adoption, where possible, is the permanent plan preferred by the Legislature. [Citation.]" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*).) "[I]n order to terminate parental rights, the court need only make two findings: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services shall be terminated. . . . '[T]he critical decision regarding parental rights will be made at the dispositional or review hearing, that is, that the minor cannot be returned home and that reunification efforts should not be pursued. In such cases, the decision to terminate parental rights will be relatively automatic if the minor is going to be adopted.' [Citation.]" (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249–250; accord, § 366.26, subd. (c).)

Thus, at a section 366.26 hearing, "[a] finding . . . under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent . . . and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights. Under these circumstances, the court shall terminate parental rights unless . . . : [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. [¶] (ii) A child 12 years of age or older objects to termination of parental rights." (§ 366.26, subds. (c)(1)(B)(i)–(ii).) "[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence. [Citation.]" (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.) "Because a parent's claim to such an exception is evaluated in light of the Legislature's preference for

adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption." (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469; accord *In re Celine R.* (2003) 31 Cal.4th 45, 53.)

Appellate courts have routinely applied the substantial evidence rule when reviewing a juvenile court's determination that an exception to termination did not apply. (See *In re B.D.* (2008) 159 Cal.App.4th 1218, 1235; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 228; *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947; *Autumn H., supra,* 27 Cal.App.4th at pp. 576–577.) However, Division Three of this court has held that abuse of discretion is the proper standard. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*).)

A third standard of review was recently articulated by the Sixth District, in *In re I.W.* (2009) 180 Cal.App.4th 1517 (*I.W.*) and *In re Bailey J.* (2010) 189 Cal.App.4th 1308, and adopted by the Second District in *In re K.P.* (2012) 203 Cal.App.4th 614, 622. The court undertakes a two prong analysis in determining the application of the beneficial relationship exception. The first prong is whether the parent has maintained regular visitation and contact with the child. The second is whether a sufficiently strong bond exists between the two, such that the child would suffer substantial detriment from its termination. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449–450.) The Sixth District has said that the first determination is, because of its factual nature, properly reviewed for substantial evidence. (*In re Bailey J.,* at p. 1314.) But, the second prong analysis "is *based* on the facts but is not primarily a factual issue. It is, instead, a 'quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.] Because this component of the juvenile court's decision is discretionary, the abuse of discretion standard of review applies." (*Id.* at p. 1315.) We believe the result would be the same in this case under an abuse of discretion standard, a substantial evidence standard, or the standard articulated in *I.W.* and *Bailey J.* The practical

differences between the standards are "not significant," as all three give deference to the juvenile court's judgment. (See *Jasmine D., supra,* 78 Cal.App.4th at p. 1351.)

Despite mother's spotty track record in the beginning of this dependency case, we will assume that mother maintained regular visitation and contact with Tristan and that, therefore, the first prong of section 366.26, subdivision (c)(1)(B)(i), has been met. Nonetheless, we conclude that the juvenile court did not abuse its discretion, or make a finding unsupported by substantial evidence, in determining the exception inapplicable. Tristan did not have a parental relationship with mother that necessitated preservation at the expense of depriving him of the permanency of adoption.

"Under section 366.26, subdivision (c)(1)(B)(i), parental rights cannot be terminated where the juvenile court 'finds a compelling reason for determining that termination would be detrimental to the child' because '[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.' The exception does not require proof the child has a 'primary attachment' to a parent or the parent has 'maintained day-to-day contact' with the child. [Citation.] [¶] The exception's second prong requiring that 'the child would benefit from continuing the [parent-child] relationship' means that 'the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' [Citation.] The juvenile court 'balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.' [Citation.] 'If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' [Citation.] [¶] 'The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond.' [Citation.]" (*C.B., supra,*

190 Cal.App.4th at pp. 123–124 [relying on, inter alia, *Autumn H., supra,* 27 Cal.App.4th at pp. 575–576].)

"While the exact nature of the kind of parent/child relationship which must exist to trigger the application of the statutory exception to terminating parental rights is not defined in the statute, the relationship must be such that the child would suffer detriment from its termination. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.) "Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*Autumn H., supra,* 27 Cal.App.4th at p. 575.) "[T]he *Autumn H.* language, while setting the hurdle high, does not set an impossible standard nor mandate day-to-day contact. . . . A strong and beneficial parent-child relationship might exist such that termination of parental rights would be detrimental to the child, particularly in the case of an older child, despite a lack of day-to-day contact and interaction." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) The exception "appl[ies] to situations where a dependent child benefits from a continuing parental relationship; not one, . . . when a parent has [loving and] frequent contact with but does not stand in a parental role to the child." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.) "The . . . negative effect of interaction may be shown by such things as, despite regular visitation by the parent, the fact that a child repeatedly expresses that he or she does not want to visit the parent [citation], and unhappiness and acting out by the child related to parental visits. [Citation.]" (*In re Angel B., supra,* 97 Cal.App.4th at p. 467, fn. 4.)

In arguing that the *Autumn H.* factors weigh in favor of finding application of the beneficial relationship exception, mother relies heavily on the fact that Tristan spent approximately eight of his 10 years in mother's care. But, mother fails to acknowledge

that, during that time, she abused alcohol, suffered from untreated mental illness, was the subject of repeated referrals for physical abuse and neglect, and shifted much of her parental responsibility to Tristan. And, it has been over two years since Tristan lived with mother. It is also true that Tristan's CASA recommended guardianship as the permanent plan. However, we find the recommendation to be of little assistance, as it does not explain why the preferred plan of adoption was rejected. The CASA noted only that Tristan continued to visit with mother, he had not observed them together, and that "[w]hen asked about these visits, Tristan's behavior and responses modulate between reserved and extremely closed."

There is evidence in the record of a positive attachment between Tristan and mother. Mother cooked for and played with Tristan during visits, Tristan calls her "mommy," and Tristan exhibited some anxiety about the prospect of adoption that mother was able to soothe. But, after visits were most recently reduced, Tristan did not express any concern or request more visits. There was also evidence that Tristan experienced behavioral problems after visits. One could reasonably infer Tristan's behavioral problems were due to mother's continued manipulative behavior. And, although we recognize that Tristan has a special need to stay connected to his tribal culture, there is no evidence that mother is the only one who can meet this special need. In fact, mother had not attempted to maintain any contact between Tristan and her family after his toddler years.

On the other hand, the de facto parents had provided Tristan with consistency, affection, and responsiveness to his emotional needs. Tristan had progressed behaviorally and academically in their care. We fail to see how Tristan's relationship with mother necessarily outweighs the stability and permanence he has found with the de facto parents, especially when mother never advanced to unsupervised visitation with Tristan and her visits were reduced because of their disruptive nature. (See *In re Casey D., supra,* 70 Cal.App.4th at p. 51 [the necessary showing "will be difficult to make in the situation . . . where the parents have essentially never had custody of the child nor advanced beyond supervised visitation"].)

Mother relies on *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*), in which an order terminating parental rights was reversed because the juvenile court erroneously determined that the beneficial relationship exception did not apply. In *S.B.*, the Agency reported the father had " 'complied with every aspect of his case plan,' including maintaining his sobriety and consistently visiting S.B." (*Id.* at p. 293.) Nonetheless, the father's reunification services were terminated because the social worker opined that the father's physical and emotional health prevented him from reunifying with S.B. (*Ibid.*) The father had maintained supervised visits with S.B. three times a week. S.B. became upset when the visits ended and wanted to leave with the father. The father " 'demonstrate[d] empathy and the ability to put himself in his daughter's place to recognize her needs.' " (*Id.* at p. 294.) A bonding study revealed that the bond between father and daughter was "fairly strong." During the observed visits, S.B. sat in the father's lap, played games, and colored. "In the middle of coloring, S.B. [told the father], 'I love you,' and he responded in kind. S.B. whispered and joked with [the father] and then spontaneously said, 'I wish I lived with you and Mommy and Nana.' " (*Id.* at p. 295.) The juvenile court found that the beneficial relationship exception did not apply and terminated parental rights. (*Id.* at p. 296.)

On appeal, the reviewing court concluded that "there is no evidence to support the court's finding [the father] did not have some type of parental relationship with S.B." (*S.B., supra,* 164 Cal.App.4th at p. 298.) The court observed: "As we recognized in *Autumn H.,* [a parental] relationship typically arises from day-to-day interaction, companionship and shared experiences, and may be continued or developed by consistent and regular visitation after the child has been removed from parental custody. [Citation.] The record here fully supports the conclusion [the father] continued the significant parent-child relationship despite the lack of day-to-day contact with S.B. after she was removed from his care. [Citation.] [¶] . . . [¶] The court recognized that S.B. would benefit from continuing her relationship with [the father] and based its decision to terminate parental rights in part on the grandparents' willingness to allow [the father] to continue to visit S.B. We do not believe a parent should be deprived of a legal

relationship with his or her child on the basis of an unenforceable promise of future visitation by the child's prospective adoptive parents. This situation is not, as the Agency contends, analogous to the sibling relationship exception under section 366.26, subdivision (c)(1)(B)(v), in which the court considers future sibling contact and visitation. [Citation.] Unlike the parent-child relationship, sibling relationships enjoy legal recognition after termination of parental rights. [Citations.]" (*Id.* at pp. 299–300, italics omitted.) Because "the only reasonable inference [was] that S.B. would be greatly harmed by the loss of her significant, positive relationship with [her father]," the court concluded the juvenile court erred when it found the beneficial relationship exception did not apply and terminated parental rights. (*Id.* at p. 301.)

This case is distinguishable, in that, as we outlined in our previous opinion (No. A132058), mother did not comply with every aspect of her reunification plan. Nor does the evidence show that mother consistently has an ability to empathize with Tristan or put his needs before her own. The *S.B.* court has since emphasized: "Our effort . . . to discourage the improper and inaccurate use of our opinion in *S.B.* has not been successful. [I]n literally dozens of unpublished opinions various panels of this court and courts in other appellate districts have been required to distinguish *S.B.* on its facts and repeatedly reject the notion a parent can prevent termination of parental rights by merely showing there is some measure of benefit in maintaining parental contact. We have not found any case, published or unpublished, in which a reviewing court, relying on *S.B.*, provided relief to a litigant whose parental rights were terminated. [¶] . . . [¶] . . . *S.B.* is confined to its extraordinary facts. It does not support the proposition a parent may establish the parent-child beneficial relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact." (*In re C.F.* (2011) 193 Cal.App.4th 549, 558–559.)

Nor is it determinative that the juvenile court was aware the case had been referred to the Consortium for Children for mediation of a postadoption contact agreement. Mother argues that "[i]t is improper to consider the prospect of post adoption contact when determining an exception to terminating parental rights." (See *S.B., supra,*

164 Cal.App.4th at p. 300; *C.B., supra,* 190 Cal.App.4th at pp. 127–128 [juvenile court improperly found benefits of adoption not outweighed, based, in part, on expectation that adoptive parents would permit children to have continued contact with mother after adoption].) Here, unlike in *S.B.* and *C.B.*, there is nothing in the record that supports mother's speculation that the juvenile court impermissibly relied on potential postadoption contact between mother and Tristan in concluding that the beneficial relationship exception did not apply. The juvenile court merely asked if a referral needed to be made to the Consortium for Children. This record does not show that the court was not properly focused on whether severing the parent-child relationship would deprive Tristan of a substantial, positive emotional attachment such that he would be greatly harmed if visits ceased.

We agree with the Agency that the facts of this case are more closely analogous to those presented in *Jasmine D.* In *Jasmine D., supra,* 78 Cal.App.4th 1339, the mother had visited consistently with Jasmine, who was three years old at the time of the hearing. During visits, mother was nurturing and provided the child with food, guidance, and discipline. However, the mother never progressed from supervised to unsupervised visits and had complied with virtually none of the requirements of her reunification plan. (*Id.* at pp. 1343–1344.)

In considering whether the juvenile court had abused its discretion, in finding the beneficial relationship exception inapplicable, the reviewing court observed: "The exception . . . must be considered in view of the legislative preference for adoption when reunification efforts have failed. [Citation.] So viewed, the exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent. The [beneficial relationship] exception is not a mechanism for the parent to escape the consequences of having failed to reunify." (*Jasmine D., supra,* at p. 1348.) "[A] *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one. [Citations.] . . . Thus, a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship

that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship." (*Id.* at p. 1350.) The reviewing court concluded that the juvenile court had not abused its discretion, stating: "The benefit of a stable, permanent adoptive home for Jasmine clearly outweighed the benefit of a continued relationship with [the mother], who despite her successful visitation record had made no steps toward overcoming the problems leading to Jasmine's dependency on the juvenile court." (*Id.* at pp. 1351–1352.)

The juvenile court's determination, that the benefits to be received from a continued relationship with mother do not outweigh the benefits of permanence and stability to be gained through adoption, is supported by substantial evidence and does not constitute an abuse of discretion. "[F]requent and loving contact" between a parent and child simply is not enough. (*In re Beatrice M., supra,* 29 Cal.App.4th at pp. 1418–1419.)

B. *Bonding Study*

Next, mother argues that the juvenile court abused its discretion by denying her request for an expert to perform a bonding study. The Agency responds by asserting that mother's challenge to the bonding study order is not properly before us.

Mother's trial counsel filed a notice of appeal on October 19, 2011, stating she was appealing from the October 17, 2011 order terminating parental rights. The notice of appeal contained no reference to the August 31, 2011 order denying her request for a bonding study. We will assume, however, that, liberally construed, mother's notice of appeal preserved her challenge to the August 31, 2011 order denying the bonding study. (See *In re Madison W.* (2006) 141 Cal.App.4th 1447, 1449 ["liberal construction of a parent's notice of appeal from an order terminating parental rights encompasses the denial of the parent's section 388 petition, provided the trial court issued its denial during the 60-day period prior to the parent's filing the notice of appeal"].) But, even if we have jurisdiction to consider the order, mother's argument fails on the merits.

A juvenile court has no statutory obligation to order a bonding study before terminating parental rights. (*Richard C., supra,* 68 Cal.App.4th at p. 1195; *In re*

Lorenzo C. (1997) 54 Cal.App.4th 1330, 1339 (*Lorenzo C.*).) Rather, the juvenile court has discretion to appoint an expert to conduct such a study. (*In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1084.) "The applicable standard of review is whether, under all the evidence viewed in a light most favorable to the juvenile court's action, the juvenile court could have reasonably refrained from ordering a bonding study. [Citation.]" (*Lorenzo C., supra,* 54 Cal.App.4th at p. 1341.)

Mother argues that a bonding study was required because she has a due process right to present evidence that would support the beneficial relationship exception under § 366.26, subdivision (c)(1)(B)(i). A similar argument was rejected by Division Three of this court in *Richard C., supra,* 68 Cal.App.4th 1191, in which a mother challenged the juvenile court's order terminating parental rights to her two sons, aged two and eight at the time of removal. She argued that the court erred by denying her motion for a bonding study, which had been presented after reunification services had been terminated and a permanency planning hearing had been set. She sought the bonding study in an attempt to show the application of the beneficial relationship exception to termination, and argued that due process and equal protection required evidence from a neutral expert. (*Id.* at pp. 1193–1195.)

In concluding that the juvenile court did not abuse its discretion, the reviewing court reasoned: "[A]t such a late stage in the proceedings, [the mother]'s right to develop further evidence regarding her bond with the children was approaching the vanishing point. . . . '[A]lthough the preservation of a minor's family ties is one of the goals of the dependency laws, it is of critical importance only at the point in the proceeding when the court removes a dependent child from parental custody (§ 202, subd. (a)). [Fn. omitted.] Family preservation ceases to be of overriding concern if a dependent child cannot be safely returned to parental custody and the juvenile court terminates reunification services. Then, the focus shifts from the parent's interest in reunification to the child's interest in permanency and stability. [Citation.]' ([*Lorenzo C.*], *supra,* 54 Cal.App.4th [at pp.] 1339–1340.) As was the case in *Lorenzo C.*, the issue before us arose well after the juvenile court removed the children from [the mother's] custody and terminated

reunification services. [¶] . . . [¶] . . . 'The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. [¶] At the time the court makes its determination, the parent and child have been in the dependency process for 12 months or longer, during which time the nature and extent of the particular relationship should be apparent.' [Citations.] [¶] Bonding studies after the termination of reunification services would frequently require delays in permanency planning. Similar requests to acquire additional evidence . . . could be asserted in nearly every dependency proceeding where the parent has maintained some contact with the child. The Legislature did not contemplate such last-minute efforts to put off permanent placement. [Citation.] While it is not beyond the juvenile court's discretion to order a bonding study late in the process *under compelling circumstances*, the denial of a belated request for such a study is fully consistent with the scheme of the dependency statutes, and with due process." (*Richard C.*, *supra*, 68 Cal.App.4th at pp. 1195–1197, italics added.)

Richard C. is directly on point. We do not see any compelling circumstances in this case that necessitated the preparation of a bonding study just weeks before the scheduled section 366.26 hearing. Judges Mahoney and Woolard were new to the case. But, several different Agency reports had addressed the nature of the relationship between mother and Tristan. Furthermore, mother herself was available to testify regarding her relationship with Tristan. The juvenile court did not abuse its discretion in denying mother's request.

C. *Tristan's Wishes*

Next, mother challenges the termination of parental rights on the ground that the juvenile court failed to consider Tristan's wishes. The record does not support mother's contention.

1. *Background*

While mother's trial counsel was cross-examining Pazhempallil, the following colloquy occurred:

"Q. And you are aware that a child's statements . . . should be included in [the section 366.26] report regarding adoptions?

"[MINOR'S COUNSEL]: Objection, that misstates the law.

"THE COURT: Sustained.

"[MOTHER'S COUNSEL]: Q. Are you aware that a statement from the child should be in the report, and if it is not, there should be a reason for that?

"[MINOR'S COUNSEL]: Objection. That misstates the law.

"[MOTHER'S COUNSEL]: It does not, Your Honor. I have the statute right here.

"[MINOR'S COUNSEL]: If I could just say a child under ten, under twelve, does not need to be asked directly, does not need to give a statement. It is by inference that the minor's wishes are conveyed. So I object to this line of questioning. It is outside any type of law.

"[AGENCY'S TRIAL COUNSEL]: Your Honor, if there is any issue about that statement, I'd direct counsel to page 8 where Tristan's statement says that he's fully aware of the adoption and wants to be adopted[.] So I don't that that [*sic*] could be any clearer.

"[MOTHER'S TRIAL COUNSEL]: I am aware of that statement. Thank you. My point, Your Honor, is that counsel is right. The child is not obligated to have a statement, but if there is any meaningful response to adoption in this report, then the social worker and the agency is obligated to tell the Court why and what is the reason for that. And to the point about this statement, the statement is that Tristan is fully aware of the permanent plan of adoption. It's not a statement about his response to being adopted. [¶] I have not heard yet today from the agency as to what Tristan's response is to the possibility of never seeing his mother again. There is a permanent and irreversible consequence to adoption. I am not convinced that this one sentence fulfills the obligation by the agency such that the Court can find him adoptable by clear and convincing evidence.

"THE COURT: Any response?

"[AGENCY'S TRIAL COUNSEL]: Your Honor, I believe that the statement is clear, the testimony has been that the child knows about adoption and wants to be adopted. I don't know how much more concrete it could be."

Later mother's trial counsel asked Pazhempallil:

"Q. So when you met with Tristan two weeks ago, you knew that there was the possibility that he may never see his mother again?

"[MINOR'S COUNSEL]: This is not relevant and it's becoming argumentative.

"THE COURT: Sustained.

"[MOTHER'S TRIAL COUNSEL]: Your Honor, I just wish the Court to have the information before you render a decision. The decision is irreversible. . . . [T]o find Tristan adoptable, the Court can't be undermined by this separate report if it doesn't clearly describe Tristan's understanding of the permanency of adoption. And I am simply trying to get that evidence before you.

"[MINOR'S COUNSEL]: [Mother's counsel] is misstating the law again. This child is under 10.

"[COUNSEL FOR DE FACTO PARENTS]: I would concur. The statute says that it's actually 12 and over that can express a desire not to be adopted. There are reasons for that, and that's because nine year olds sometimes can't comprehend all these things and that is why they have attorneys who make recommendations and take positions for them.

"And that's why the law has said over twelve, we think you can make that decision. At nine the law is obviously of the opinion that they are not quite at a level of understanding and recognition to make these decisions. So I just feel like we are going on a path that is somewhat irrelevant and somewhat misleading. . . . [¶] . . . [¶]

"THE COURT: The objection is sustained. It's irrelevant."

Finally, mother's trial counsel attempted to ask Pazhempallil about the confusion Tristan expressed when reunification services were terminated. Counsel for the de facto parents said: "I go back to the same problem and issue in that he is nine. . . . [H]e is not at the age where . . . he can veto an adoption. He has counsel who is here to represent his

interests because he is nine." The court ruled: "Due to his age, [Tristan's] wishes are not as paramount as they would be if he were twelve or older. The role of this Court at this stage is to consider whether he is adoptable and what should happen. His wishes are really not as relevant as you would like to make them. I thought that you were attempting to perhaps establish some exception . . . to the adoptability and I would be interested in hearing testimony about that. [¶] . . . [¶] That is relevant. But the child's individual wishes at this age really are not. [¶] . . . [¶] Not the way you are trying to present them."

2. *Analysis*

Section 366.26, subdivision (h)(1), provides: "At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child."[12] This statutory mandate has been interpreted "as imposing a mandatory duty on the courts to 'consider the child's wishes to the extent ascertainable' prior to entering an order terminating parental rights under section 366.26, subdivision (c). [Citation.] [T]his statement 'may take the form of direct formal testimony in court; informal direct communication with the court in chambers, on or off the record; reports prepared for the hearing; letters; telephone calls to the court; or electronic recordings.' (*In re Diana G.* (1992) 10 Cal.App.4th 1468, 1480 [(*Diana G.*)].)" (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1591 (*Leo M.*), fn. omitted.) The statute does not require that the child testify. (*Leo M.*, at p. 1591, fn. 6; *In re Jesse B.* (1992) 8 Cal.App.4th 845, 852–853.)

"[A]lthough the court is obligated to consider a child's best interests at the section 366.26 hearing, the court need not follow the child's wishes unless he or she is over the

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[12] At the time of the section 366.26 hearing, former Section 317, subdivision (e), provided, in relevant part: "In any case in which the child is four years of age or older, counsel shall interview the child to determine the child's wishes and to assess the child's well-being, *and shall advise the court of the child's wishes*." (Italics added.) The Agency is also required by statute to include, in it section 366.26 report, "a statement from the child concerning placement and the adoption . . . , unless the child's age or physical, emotional, or other condition precludes his or her meaningful response, and if so, a description of the condition." (§§ 366.21, subd. (i)(1)(E), 366.22, subd. (c)(1)(E).)

age of 12. (§ 366.26, subds. [(c)(1)(B)(ii)], (h).) Thus, even though young children . . . may want to live with [their parent], doing so may not be in their best interest and the court may nonetheless terminate parental rights." (*In re Joshua G.* (2005) 129 Cal.App.4th 189, 201.)

In arguing that the juvenile court improperly sustained objections to her attempted cross-examination, mother relies on the *Diana G.* court's statement that the predecessor to section 366.26, subdivision (h), "require[s] the juvenile court to receive *direct evidence* of the children's wishes regarding termination and adoption at the permanency planning hearing." (*Diana G., supra,* 10 Cal.App.4th at p. 1480, italics added.) The *Diana G.* court also held that the child had to be made aware that termination of parental rights was at issue. (*Ibid.*) But, other courts have rejected such a strict reading of the statute. "While a direct statement of a minor's feelings regarding termination is certainly the most dispositive of the minor's wishes, it will not always be possible or in the minor's best interest to obtain such a statement. For example, some children are simply too young or too immature to understand the concept of termination of parental rights, let alone express their feelings about such a prospect, while others may be permanently and severely traumatized if asked to grapple with the possibility of severing all ties to their biological parents. [¶] The process must be sufficiently flexible to provide some accommodation to the varying circumstances that will inevitably present themselves. Therefore, we believe the decision in a termination action whether to require a direct statement from the minor regarding his/her thoughts is one that is best left to the sound discretion of the trial judge." (*Leo M., supra,* 19 Cal.App.4th at p. 1592.)

In *Leo M.,* there was no direct evidence of the child's preferences. There was also no evidence that showed the five-year-old child was incapable of commenting on his relationships with his mother and prospective adoptive parents. (*Leo M., supra,* 19 Cal.App.4th at p. 1593.) However, the court observed: "[W]hile the record contains no direct evidence of Leo's thoughts on this matter, it does include ample evidence from which his feelings can be inferred." (*Ibid.*) The adoptions worker had reported that Leo had formed a substantial bond with his prospective adoptive parents and commented that

they are " 'the only parents that [Leo] can recall.' " (*Ibid.*) It was also reported that Leo did not recognize or acknowledge his mother during the one visit they had during reunification. (*Ibid.*) Thus, the court stated: "[E]ven though Leo did not directly express his wishes, it is a reasonable and compelling inference on this evidence that Leo would prefer to live with the only mother and father he has acknowledged. Further, there is nothing before us to support the conclusion that not taking direct evidence of Leo's wishes was an abuse of discretion or was prejudicial under the circumstances of this case. Therefore, we find sufficient evidence here to conclude the court could reasonably ascertain the wishes of Leo." (*Id.* at p. 1594.)

In *In re Amanda D.* (1997) 55 Cal.App.4th 813 (*Amanda D.*), the Fourth District followed *Leo M.* and held that the statutory requirement had been complied with when "there was a reasonable basis for inferring the minors' wishes." (*Amanda D.*, at pp. 819–821.) The minors did not testify at the termination hearing, but five-year-old David talked about " 'my home, my room, my dog,' " in referring to his life with the prospective adoptive parents. (*Id.* at p. 820.) There was also evidence that both he and his seven-year-old sister were apathetic about visiting their father. The record showed that Amanda's behavioral problems had improved since being placed with the prospective adoptive parents. (*Id.* at pp. 816–817, 820.) Based on this evidence, the court concluded that "[t]here was sufficient evidence for the court to assess the minors' wishes and their best interests." (*Id.* at p. 821.) The court also noted: "[N]othing would have been gained by eliciting [Amanda's] wishes directly because she had 'no solid concept of adoption and what that means.' " (*Id.* at pp. 820–821.)

We agree with *Leo M.* and *Amanda D.* that "direct evidence" of the child's wishes is not required and that it is not necessary that the child understand the permanency of termination of parental rights. Thus, the juvenile court properly ruled that evidence on these points was irrelevant. However, the debate is largely academic in this case because, contrary to mother's assertion, the Agency's section 366.26 report directly addresses Tristan's wishes. In a subsection titled "Child's Statement Concerning Placement and Plan," Pazhempallil specifically wrote: "Tristan is fully aware of the permanent plan of

adoption with [Deirdre] and Kent. He has reported that he likes being in the [their] home . . . and on occasions asked [Deirdre] if she would adopt him. When over-night visits started Tristan looked forward to those visits with much enthusiasm and excitement." Pazhempallil also testified at the hearing that Tristan knew the Agency was recommending adoption, understood its permanency, and had told the de facto parents that he would like them to adopt him. Mother herself testified regarding Tristan's sadness upon learning that reunification services would be terminated. Although Tristan was apparently somewhat ambivalent about his relationship with his mother, the evidence presented in this case is, nonetheless, very similar to the evidence considered sufficient by the *Diana G.* court, which consisted of reports from others, including the social worker and the children's attorneys, that the children said they wanted to be adopted. (*Diana G., supra,* 10 Cal.App.4th at pp. 1480–1481.)

Furthermore, the reports and testimony also contained evidence from which the court could infer Tristan's wishes. For instance, Tristan was noted to be "happy" and progressing both academically and behaviorally in his prospective adoptive family's care. Tristan had not requested more visits with mother since they had been reduced. Finally, Tristan was represented by independent counsel at the hearing. His counsel supported the Agency's recommendation for termination of parental rights. We presume that counsel complied with section 317, subdivision (e), and asked Tristan about his wishes. (See *In re Jesse B., supra,* 8 Cal.App.4th at pp. 852–853.) His counsel's argument in favor of termination satisfied the requirement that Tristan's wishes be presented to the juvenile court. (§ 317, subd. (e).) The record shows that the juvenile court considered Tristan's wishes.

D. *The Juvenile Court's Written Finding that Visitation is Detrimental*

Finally, mother argues that the juvenile court's entry, in its written findings and orders, that visitation between mother and Tristan is detrimental, was mistaken. On the court's written order (Judicial Council Forms, form JV-320 (rev. Jan. 1, 2011)), box 16 is checked, which states that Tristan's permanent plan is adoption, and under that, box 16.c. is checked, which states that visitation between Tristan and mother "is detrimental to the

child's physical or emotional well-being and is terminated." Mother contends that the detriment finding is prejudicial to the proposed mediation for a postadoption contact agreement. (See Fam. Code, § 8616.5, subds. (a), (b) ["[n]othing in the adoption laws . . . shall be construed to prevent the adopting . . . parents, the birth relatives . . . , and the child from voluntarily entering into a written agreement to permit continuing contact between the birth relatives . . . and the child *if the agreement is found by the court to have been entered into voluntarily and to be in the best interests of the child at the time the adoption petition is granted*" (italics added)].)

We do not agree with the Agency that mother's argument is moot. " 'An appellate court will not review questions which are moot and which are only of academic importance. It will not undertake to determine abstract questions of law . . . [when] no substantial rights can be affected by the decision either way.' [Citation.]" (*In re Audrey D.* (1979) 100 Cal.App.3d 34, 39, fn. 4.) The Agency relies on *Diana G., supra*, 10 Cal.App.4th 1468. In that case, the juvenile court issued a ruling, *before parental rights were terminated*, determining that any visits or contact by the parents would be detrimental to the children, and denying their request for visitation. (*Id.* at pp. 1475–1476.) On appeal from the visitation ruling, the court observed: "[S]ince this appeal was filed, the court has terminated the Parents' rights with regard to Diana and freed her for adoption. The claim regarding visitation is now moot." (*Id.* at p. 1483, fn. omitted.)

Although we believe *Diana G.* is distinguishable, we do not see why the Agency would seek a juvenile court order terminating mother's visitation at the same time it was recommending mediation for postadoption contact following termination of her parental rights. Section 366.26, subdivision (c)(4), provides, in relevant part, that "[i]f the court finds that adoption of the child or termination of parental rights is *not* in the best interest of the child . . . [¶] . . . [¶] [t]he court shall also make an order for visitation with the parents . . . unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child." But, section 366.26 makes no provision for court-ordered parental visitation after parental rights are terminated. "The parent-child relationship enjoys no legal recognition after

termination of parental rights. [Citation.] Thus, nothing in . . . section 366.26 requires the court to address postadoption visitation when terminating parental rights . . . , and *the court has no authority to essentially modify a termination order by granting visitation to the parent*. [Citations.]" (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1391, italics added.) In fact, once parental rights are terminated and a child is referred for adoption, the State Department of Social Services or a licensed adoption agency "shall be responsible for the custody and supervision of the child and shall be entitled to the exclusive care and control of the child at all times until a petition for adoption . . . is granted . . . ." (§ 366.26, subd. (j).) Decisions regarding visitation and placement during this period are only subject to the juvenile court's review for abuse of discretion. (See *Department of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 733–734; *Amber R. v. Superior Court* (2006) 139 Cal.App.4th 897, 900–903.) It is presumably for this reason that Judicial Council Forms, form JV-320 indicates that box 16 should be skipped if parental rights are terminated.

In our view, however, it seems reasonably clear that box 16 was checked only inadvertently by the juvenile court, possibly because the written order was submitted to and signed by a different judge than the one who presided over the section 366.26 hearing. The Agency did not ask the juvenile court to make a detriment finding. At the conclusion of the section 366.26 hearing, the juvenile court did note that "supervised visits with mother . . . are terminated," but did not make a detriment finding. The court did ask: "Does the Court need to make any kind of official order regarding the referral [to the Consortium for Children]?" And, the court was informed that the referral had already been made. The juvenile court was clear that parental rights were being terminated. Thus, the written order's detriment finding conflicts with the reporter's transcript and the section of the written order terminating parental rights.

The Courts of Appeal have reached conflicting conclusions regarding which order controls when a juvenile court's oral pronouncements differ from its written order. (See, e.g., *In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1241 & fn. 5 [oral pronouncement prevails over conflicting written order]; *In re Jerred H.* (2004) 121 Cal.App.4th 793, 798

& fn. 3 [juvenile court's written order terminating parental rights controlled over contrary oral pronouncements at hearing]; *In re Jennifer G.* (1990) 221 Cal.App.3d 752, 756, fn. 1 [to extent "court's oral pronouncement differed from its written order, the written order controls"].) But, we have previously concluded that a juvenile court's oral pronouncement prevails when its written order is internally inconsistent. (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1259–1260, fn. 9; see also *People v. Smith* (1983) 33 Cal.3d 596, 599 [when harmonization is not possible, "that part of the record will prevail, which, because of its origin and nature, is entitled to greater credence"].) Here, the written order is not entitled to greater credence than the reporter's transcript because it was not signed by the same judge who made the oral order and it is internally inconsistent. Thus, we conclude that the juvenile court's oral pronouncement, which did not include a finding that visitation with mother would be detrimental, prevails over the written order.

III. DISPOSITION

The juvenile court's orders are affirmed. The juvenile court is directed to correct its written orders so as to delete the orders and findings made in section 16 of Judicial Council Forms, form JV-320.

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Bruiniers, J.

We concur:

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Jones, P. J.

_____
Needham, J.